IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1005

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WILLIAM E. SIMON,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal From the United States District Court
For the District of Columbia

JURISDICTIONAL STATEMENT

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20505
(202) 225-2801

Appellant, Pro Se

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CONTENTS

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the district court is reproduced as Appendix A, *infra,* and is not yet reported in Federal Supplement.

JURISDICTION

On May 7, 1976, appellant brought this action in the United States District Court for the District of Columbia to enjoin the increased salary disbursements to members of Congress authorized by section 225 of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361, and section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, on grounds that such disbursements violated Article I, Sections 1 and 6 of the United States Constitution. A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. Appellant's claims were submitted to the court on cross motions for summary judgment and appellees' motion to dismiss. On October 12, 1976, the three-judge district court filed an opinion sustaining the constitutionality of the statutes in question. Appendix A, *infra.* The memorandum opinion concluded with an order granting summary judgment to appellees and dismissing appellant's complaint. Appendix A, *infra,* at 8a. On October 22, 1976, appellant filed a timely notice of appeal. Appendix B, *infra.* On December 16, 1976, the Chief Justice extended the time for docketing this appeal to January 20, 1977. The Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1253.

QUESTION PRESENTED

Whether the methods of determining salary rates for Senators and Representatives under section 225 of the Postal Revenue and Salary Act of 1967 and section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in

compensation for members of Congress without requiring a direct vote by either House of Congress.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1 of the Constitution provides, in pertinent part, that:

> All legislative Powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 6 of the Constitution provides, in pertinent part, that:

> The Senators and Representatives shall receive a compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.

3. Section 225 of the Postal Revenue and Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 642, is codified at 2 U.S.C. §§ 351-361, and is reproduced as Appendix C, *infra.*

4. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, 89 Stat. 421, is codified at 2 U.S.C. § 31 and provides, in pertinent part, that:

> (1) The annual rate of pay for—
>
> (A) each Senator [and] Member of the House of Representatives, and . . .,
>
> (B) the President pro tempore of the Senate, the majority leader and the minority leader of the Senate, and the majority leader and the minority leader of the House of Representatives, and

(C) the Speaker of the House of Representatives,

shall be the rate determined for such positions under sections 351 to 361 of this title, as adjusted by paragraph (2) of this section.

(2) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of Title 5 in the rates of pay under the General Schedule each annual rate referred to in paragraph (1) shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under section 5305 of Title 5) of the adjustment in the rates of pay under the General Schedule.

STATEMENT

For 178 years—in every Congress from the 1st through the 90th—the rate of compensation for Senators and Representatives was determined by an act of Congress which specifically set forth the dollar amount members were to be paid. In 1967, however, Congress broke with this uniform, continuous tradition by including its members within the coverage of section 225 of the Postal Revenue and Salary Act of 1967 (hereinafter the "1967 Salary Act").

Section 225 of the 1967 Salary Act established the Commission on Executive, Legislative, and Judicial Salaries.[1] 2 U.S.C. § 351. Subsection (f) of section 225

[1] The Commission consists of nine members, three appointed by the President, two appointed by the President of the Senate, two appointed by the Speaker of the House of Representatives, and two appointed by the Chief Justice of the Supreme Court. 2 U.S.C. §352(1). The Commission members are appointed to a term that lasts only for the period of the fiscal year with respect to which they were appointed. 2 U.S.C. §§ 352(2)-(3).

directed the Commission to conduct in fiscal year 1969, and every fourth fiscal year thereafter, a study of the rates of compensation paid to members of Congress, Justices of the Supreme Court, federal judges, and certain other high ranking government officials. 2 U.S.C. § 356. On or before January 1, following the completion of each quadrennial Commission study, the Commission must submit the results of its review to the President, together with recommendations regarding salary adjustments. 2 U.S.C. § 357. Under subsection (h) of section 225, the President must include in each budget immediately following receipt of a Commission quadrennial report his own recommendations regarding the salary rates of officials covered by the act. 2 U.S.C. § 358. Under subsection (i) of section 225, the salary recommendations of the President automatically become effective after 30 days unless (a) a law has been enacted establishing a rate of pay other than that recommended or (b) one House of Congress enacts legislation specifically disapproving all or any part of the President's recommendations. 2 U.S.C. § 359(1).

In December of 1968, the Commission submitted its first quadrennial report to the President. The Commission's report recommended substantial salary increases for all of the positions covered by the act. On January 15, 1969, the President submitted to Congress his budget for the next fiscal year. The President's budget included a recommendation in favor of the salary increases suggested by the Commission. Congress took

no action with respect to the President's salary recommendations; consequently, the salary increases became effective on February 15, 1969. *See* 34 Fed. Reg. 2241 (Feb. 15, 1969). As a result of Congress' failure to act within 30 days, appellees increased salary disbursements to members of Congress by 41.67%, from $30,000 to $42,500 per annum.

The second Commission was appointed in December 1972, too late to report to the President by January 1, 1973. The second Commission quadrennial report was submitted to the President on June 30, 1973. The Commission's report recommended substantial salary increases for all officials covered by the act. On February 4, 1974, the President submitted his budget to Congress, including a recommendation in favor of the salary increases suggested by the Commission. On February 28, 1974, the Senate Committee on Post Office and Civil Service reported a resolution, S. Res. 293, which would have permitted all provisions of the President's recommendations, except those providing adjustments in the pay of members of Congress, to take effect. S. Rep. No. 701, 93rd Cong., 2d Sess. (1974). However, the Committee resolution was amended on the floor of the Senate and passed in a form that disapproved all of the recommended salary adjustments. 120 Cong. Rec. 5492-5497, (March 6, 1974); S. Res. 293, 93rd Cong., 2d Sess. (1974).

On December 2, 1976, the Commission submitted its third quadrennial report to the President. The Commission recommended an average 36.4% salary increase for officials covered by the act. However, the Commission made its salary recommendations expressly conditional on the adoption of a strict code of public conduct for all officials involved, which (i) would require full public disclosure of all outside sources of income; (ii) would restrict the nature and amount of outside income that could be earned by an official while in office; (iii) would include strict conflict of interest prohibitions; (iv) would limit the nature of post-government service employment that would be allowed; and (v) would require unambiguous restrictions on expense accounts and vigorous auditing thereof.

On January 17, 1977, the President transmitted his budget to Congress. The President's budget recommended pay increases only slightly lower than those recommended by the Commission. Like the Commission's recommendations, the President's salary recommendations were conditioned upon the adoption of a strict code of public conduct for all officials covered by the act. Although it is not clear what impact the conditional nature of the President's salary recommendations will have, it is probable that if Congress does not act within 30 days, the appellees will increase salary disbursements to members of Congress by 28.92%, from $44,600 [2] to $57,500 per annum.

The second statute involved in this appeal is the Executive Salary Cost-of-Living Adjustment Act of 1975 (hereinafter the "1975 Adjustment Act"). Prior to 1975, members of Congress, Justices of the Supreme Court, federal judges, and certain high ranking offi-

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[2] As is noted *infra*, at 10, Executive Order 11941 had the effect of raising the salary rate for Senators and Representatives 4.83%, from $44,600 to $46,800 per annum. *See* 41 Fed. Reg. 43889, 43894 (October 5, 1976). However, no disbursements of this increase have been made because Congress did not appropriate sufficient funds for such disbursements in the Legislative Appropriations Act of 1977.

cials were excluded from the annual government salary adjustments authorized by the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946, *codified at* 5 U.S.C. §§ 5305-5312. In general, Title II of the 1975 Adjustment Act extended the annual salary adjustment provisions of the Federal Pay Comparability Act to all of the government officials that previously had been excluded from its coverage. In particular, section 204(a) of the 1975 Adjustment Act provided that the rate of compensation for each member of Congress shall automatically be increased every time GS-graded employees receive an annual adjustment under the Federal Pay Comparability Act. The amount of an increase under section 204(a) is a percentage equal to the average overall percentage by which the GS salaries are increased (or would have been increased but for the statutory ceiling on upper level GS salaries).[3]

Since the adjustments to Congressional salaries under the 1975 Adjustment Act depend entirely on the adjustments to the GS salaries ordered under the Federal Pay Comparability Act, the provisions of the latter statute must be considered briefly. The Federal Pay Comparability Act requires the President to adjust annually the salaries of all GS-graded employees, all armed forces personnel, and all other federal employees compensated under a "statutory pay system." 5 U.S.C. § 5305(a)(2). The amount of each annual adjustment is governed by standards expressly set forth in the act. See 5 U.S.C. §§ 5301(a)(1)-(a)(4), 5305(a)-(b). *See generally National Treasury Employees Union* v. *Nixon,* 492 F.2d 587 (D.C. Cir. 1974).

[3] 5 U.S.C. § 5308 provides that no GS-graded employee may receive a salary in excess of the rate of basic pay for level V of the Executive Schedule. Under this provision, all salaries above GS-15 are presently frozen at $39,600 per annum. 41 Fed Reg. 43890 (Oct. 5, 1976). The effects of the statutory ceiling on so-called supergrade GS salaries are excluded when computing the average percentage at which § 204(a) adjustments to Congressional salaries are made.

If, because of national emergency or economic conditions, the President deems it inappropriate to order adjustments in the full amount required by the act, the President must submit to Congress, at least 30 days prior to the normal date for adjustment, an alternative plan and an explanation setting out the reasons therefor. 5 U.S.C. § 5305(c). If neither House of Congress disapproves the alternative plan within 30 days, it automatically becomes effective. If either House of Congress does disapprove the alternative plan, the President must immediately order the adjustments in the full amounts required under the act. In either event, the adjustments become effective as of the normal date for ordering adjustments. (October 1st).

If the President does not submit an alternative plan to Congress, he has a mandatory duty to order the full amount of the adjustments required under the act. *National Treasury Employees Union* v. *Nixon, supra,* 492 F.2d at 616. These adjustments become effective immediately and automatically. Under the act, Congress has no power to approve or disapprove such adjustments ordered by the President. The only recourse for Congress against a Presidential order adjusting pay would be repeal of the act, at least *pro tanto,* enactment of an entirely new schedule of salaries, or refusal to appropriate the sums necessary to fund the adjustments.

On October 6, 1975, the President ordered federal pay comparability adjustments for all federal em-

ployees compensated under a statutory pay system. Executive Order 11883, 40 Fed. Reg. 47092 (October 8, 1975). Since this order increased the salaries of GS-graded employees by an overall average of 4.94%, appellees increased salary disbursements to Senators and Representatives by 4.94% (from $42,500 to $44,600 per annum), as required by section 204(a) of the 1975 Adjustment Act.

On October 1, 1976, the President ordered federal pay comparability adjustments for all federal employees compensated under a statutory pay system. Executive Order 11941, 41 Fed. Reg. 43889 (October 5, 1976). Since this order increased the salaries of GS-graded employees by an overall average of 4.83%, section 204(a) automatically raised the salary rates for Senators and Representatives by 4.83% (from $44,600 to $46,800 per annum). However, appellees have not yet increased disbursements to the salary rates set under Executive Order 11941 because Congress did not appropriate sufficient funds for such disbursements in the Legislative Appropriations Act of 1977.

On May 7, 1976, appellant brought this action in the United States District Court for the District of Columbia. Appellant sought a declaratory judgment that section 225 of the 1967 Salary Act and section 204(a) of the 1975 Adjustment Act were unconstitutional insofar as they authorized adjustments to the salary rates for Senators and Representatives without requiring a direct vote of Congress. Appellant also sought to enjoin appellees from disbursing in the future any amounts of money attributable to Congressional salary adjustments under the acts. After a three-judge district court had been convened, appellant moved for summary

judgment. Appellees filed cross motions for summary judgment and a motion to dismiss appellant's complaint. After briefs and oral argument on the various motions had been submitted, the three-judge district court filed a memorandum opinion and order sustaining the statutes in question, granting summary judgment to appellees, and dismissing appellant's complaint. Appendix A, *infra*.

The opinion of the district court acknowledged that the question presented by appellant was one of first impression. Memorandum Opinion at 5, Appendix A at 6a. The court also recognized that the statutory provisions in question delegated much of Congress' authority to determine salary rates for its members. Nevertheless, the court concluded that the two statutes satisfied the requirements of Article I, Section 6, that Congressional salaries "be ascertained by Law" because (i) in passing the statutes themselves, Congress had acted "by law" (*i.e.*, by direct act of Congress); (ii) the delegation of power to ascertain Congressional salaries was not absolute because Congress retained a 30-day veto power for each House, as well as an underlying Congressional power to refuse appropriation of the sums necessary for actual disbursement; and (iii) the language of the Constitution must be read flexibly and, when so read, the ascertainment clause of Article I, Section 6 does not mandate a direct vote of Congress on each adjustment to the salary rates of Senators and Representatives.

Appellant filed a timely notice of appeal. Appendix B, *infra*. For the reasons stated below, appellant believes that all three of the district courts' conclusions enumerated above were in error, that the claim pre-

sented in this case is a substantial one which requires plenary consideration in this Court, and, therefore, that probable jurisdiction should be noted.

THE QUESTION PRESENTED IS SUBSTANTIAL

A. Appellant's Interpretation of Article I, Section 6 Is Supported by Prior Decisions, the Constitutional Debates, and the Contemporaneous Conduct of the Early Congresses

1. Article I, Section 6 of the Constitution provides that the salary rates of Senators and Representatives "shall be ascertained by Law." Although no reported case has construed the ascertainment clause of Article I, Section 6, cases construing analogous language in other parts of the Constitution [4] have unanimously concluded that the phrase "by Law" means "by act of Congress."

For example, in *Cincinnati Soap Company* v. *United States,* 301 U.S. 308 (1937), this Court stated that:

> The provision of the Constitution (cl. 7, § 9, Art. I) that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by *an Act of Congress.*

301 U.S. at 321 (emphasis supplied).

Similarly, in construing Article II, Section 2, which provides that:

> . . . the Congress may *by Law* vest the Appointment of such inferior Officers, as they think prop-

[4] In addition to Article I, Section 6, the phrase "by Law" appears in Article I, Section 2, clause 3; Article I, Section 4, clauses 1 and 2; Article I, Section 9, clause 7; Article II, Section 2, clause 5; Article II, Section 1, clause 2; and Article III, Section 2, clause 3.

> er, in the President alone, in the Courts of Law, or in the Heads of Departments[,]

the phrase "by Law" has been held to mean "by specific legislation." *Cain* v. *United States,* 73 F. Supp. 1019, 1021 (N.D. Ill. 1947).

When the reasoning of these cases is applied to the ascertainment clause, it clearly requires that the salary rates of Senators and Representatives "shall be ascertained by [act of Congress]," that is to say, by a direct vote of both Houses of Congress followed by the signature of the President.

2. Appellant's reading of the ascertainment clause is also supported by the Constitutional convention and ratification debates on the pay provisions of Article I, Section 6. Under the Articles of Confederation, delegates to the national assembly were paid by the states they represented. Articles of Confederation, Article V, Section 2. The pay provisions of Article I, Section 6, were intended as a change from this scheme which would ensure that members of Congress would be free to act for the good of the federal government without being subjected to the whims of the local state governments. *See, e.g.,* 5 Elliot, Debates on the Adoption of the Federal Constitution, 227-228 (1888); 1 Farrand, Records of the Federal Convention of 1787, at 373-374 (1937).

In response to objections that Congressmen should not be allowed unlimited power to set their own salaries, it was repeatedly stated that the public accountability of Senators and Representatives through the reelection process would operate as a sufficient check on Congressional enactment of excessive salaries. Thus, in the Massachusetts ratification debates, Delegate

Sedgwick defended Article I, Section 6, in the following terms:

> Can a man, he asked, who has the least respect for the good opinion of his fellow-countrymen, go home to his constituents after having robbed them by voting himself an exorbitant salary? This principle will be a most powerful check: and, in respect to economy, the power, lodged as it is in this section will be more advantageous to the people, than if retained by the State legislatures.

Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, 152-153 (1856).

Similarly, in the Virginia ratification debates, Madison explained and defended Article I, Section 6, in the following terms:

> "Mr. Chairman.—I most sincerely wish to give a proper explanation on this subject, in such a manner as may be to the satisfaction of every one. I shall suggest such consideration as led the convention to approve this clause. With respect to the right of ascertaining their own pay, I will acknowledge, that their compensations, if practicable, should be fixed in the constitution itself, so as not to be dependent on congress itself, or on the state legislatures. The various vicissitudes, or rather the gradual diminution of the value of all coins and circulating medium, is one reason against ascertaining them immutably; as what may be now an adequate compensation, might, by the progressive reduction of the value of our circulating medium, be extremely inadequate at a period not far distant.
>
> It was thought improper to leave it to the state legislatures, because it is improper that one government should be dependent on another: and the

> great inconveniences experienced under the old confederation, shew, that the states would be operated upon by local considerations, as contradistinguished from general and national interests. . . . [The power vested in Congress to set its members' pay] *is a power which cannot be abused without rousing universal attention and indignation. What would be the consequence of the Virginia legislature raising their pay to four or five pounds each per day? The universal indignation of the people. Should the general congress annex wages disproportionate to their service, or repugnant to the sense of the community, they would be universally execrated. The certainty of incurring the general destestation of the people will prevent abuse. . . .*
>
> But the worthy member supposes, that congress will fix their wages so low, that only the rich can fill the offices of senators and representatives. Who are to appoint them? The rich? No sir, the people are to choose them. *If the members of the general government were to reduce their compensations to a trifle, before the evil suggested could happen, the people could elect other members in their stead, who would alter that regulation.* . . . I think the evil very remote, and if it were now to happen, the remedy is in our own hands, and may by ourselves be applied. . . .

3 Farrand, *supra* at 314-316 (emphasis supplied).

3. The interpretation of Article I, Section 6, advanced in the convention and ratification debates is fully confirmed by the contemporaneous conduct of the early Congresses. The 1st Congress established the rates of pay for Senators and Representatives by act of Congress. Act of September 22, 1789, 1 Stat. 70. Indeed, as has already been noted, every Congress prior to the enactment of the 1967 Salary Act adjusted the salary

rates for its members only by direct act of Congress. Surely this early and long-standing tradition reflects the only appropriate construction of Article I, Section 6. *Cf. Myers* v. *United States,* 272 U.S. 52, 174 (1926).

B. The Reasoning of the District Court Is in Error

1. The district court rejected appellant's claim, at least initially, on the ground that "when Congress passed the Acts governing its compensation it acted 'by law'." It is, of course, true that the 1967 Salary Act and the 1975 Adjustment Act were enacted "by law" in the sense that there were no procedural irregularities in the legislative process. This fact, however, is no answer to appellant's claims. Appellant contends that Congressional salary rates themselves must be ascertained by act of Congress. This requirement is not satisfied by the fact that a procedurally regular act of Congress has established various commissions and procedures by which the executive branch ascertains the salary rates to be paid to members of Congress.

2. The district court also concluded that the statutory procedures in question effectively resulted in an ascertainment "by law" because Congress has retained a veto power in each House over recommended adjustments. Admittedly, each House of Congress does have a theoretical veto power over all or any parts of the salary adjustments recommended by the President under the 1967 Salary Act. However, the non-exercise of this theoretical veto power falls far short of an ascertainment of Congress of the salary rates that its members should be paid.

First, Congressional inaction is a passive fact that never could be considered an affirmative act of ascertainment, as required by Article I, Section 6.

Second, even if Congressional inaction could be viewed as tantamount to an affirmative ascertainment, the failure of Congress to act gives the American voters no record of where their Senators and Representatives stood on an increase that has taken effect. This latter point is extremely important because the ratification debates on the Congressional pay provisions of Article I, Section 6, clearly reflect an expectation that public accountability would operate as an adequate check on Congress' power to set its own rates of pay.

Finally, the veto power retained by Congress in the 1967 Salary Act is so severely limited by practical considerations that it cannot be considered the effective equivalent of a direct act of Congress. The exercise of the veto power is limited to a 30-day period, which makes the normal parliamentary process of hearings, report, debate, and final vote wholly impracticable. Moreover, as the experience in 1974 demonstrated, the consideration of Congressional salary recommendations under the Salary Act necessarily becomes confused with extraneous or conflicting considerations regarding the salary recommendations for officials other than members of Congress.

When one turns from the Salary Act to the Adjustment Act, the inadequacy of the Congressional veto power is even more apparent. Unlike Presidential recommendations under the Salary Act, salary adjustments ordered under the 1975 Adjustment Act take effect automatically. Congress has no power under the act to approve or disapprove Adjustment Act increases ordered by the President. The only veto power retained by Congress under the Adjustment Act is the power to veto within 30 days a Presidential "alterna-

tive plan" submitted under the national emergency or economic conditions provisions of 5 U.S.C. § 5305(c). See 5 U.S.C. §§ 5305(d)-(k). Even when the President submits an alternative plan, the power retained by Congress under the act is only a power to reject the alternative plan. If the alternative plan is rejected, the increases normally required under the act automatically take effect with no power in Congress to review or reject them.

3. The district court opinion suggests that since Congress can refuse to appropriate sufficient sums to fund the salary levels set by the challenged statutes, Congress has retained the final power to ascertain the true salaries actually paid. However, the district court's reliance on the appropriation power is no answer to appellant's claim.

Article I, Section 7, provides that no moneys shall be drawn from the Treasury except "in Consequence of Appropriations made by law." Under the district court's reasoning, the separate requirement in Article I, Section 6, of an ascertainment by law is rendered superfluous if an appropriation bill could suffice as an ascertainment. In the context of this case, Article I, Section 6 and Article I, Section 7 clearly require that the salary rates for Senators and Representatives must be ascertained by act of Congress and paid from the Treasury only when there has been an appropriation by act of Congress.

The district court's reliance on the appropriations power to satisfy the ascertainment clause also fails to recognize the inherent limitations of the appropriations process. If, for example, Congress believes the salary rates set under the 1967 Salary Act or the 1975

Adjustment Act are too low, no appropriation of additional sums could authorize disbursements at a higher rate. Moreover, to the extent that the appropriation power can be used as a partial veto of salary increases, it is an extremely impractical tool. The practical, as well as the parliamentary considerations involved in the passage of an appropriations bill make it wholly unsuitable as a vehicle for ascertaining the propriety of Congressional salary levels. Moreover, the subtle intricacy of using an appropriations bill as an indirect method of ascertaining Congressional salaries would completely subvert the policy of public accountability implicit in Article I, Section 6.

4. The district court opinion suggests that the Commission recommendations under the Salary Act are at least partially determined by Congress because two of the nine Commission members are appointed by the Speaker of the House and two more are appointed by the President of the Senate (*i.e.*, the Vice President of the United States). However, the mere fact of appointment by the Speaker of the House or the President of the Senate does not make the Congressional appointees representative of all of the various views in Congress. Moreover, even if the Congressional appointees could accurately represent all of the views in Congress, Article I, Section 6 requires Congress itself, and not some Commission with a minority of Congressional representatives, to ascertain the salary rates for Senators and Representatives.

5. The final ground upon which the district court relied was that the language of the Constitution

> . . . is not to be parsed in the narrow, rigid, manner of a statute. It must remain flexible and adapt-

able, placing reliance upon the checks-and-balances built into our tripartite format and the sound attitude of voters expressed at the polls.

Memorandum Opinion at 7-8, Appendix A at 8a.

There can be no doubt that the Constitution is an organic document that must be read with careful attention to the changes in, and changeability of, our society. However, there is nothing about American society which has altered the process of setting salary rates for Senators and Representatives. For 178 years the rates of Congressional compensation were set by a simple, direct act of Congress. The process of raising Congressional salaries was frequently politically embarrassing to the members involved, but that embarrassment was merely a manifestation of the public accountability that Article I, Section 6 intended. Nothing about American society has changed in a way that would make direct Congressional ascertainment of its own members' pay more difficult now than was true for the first Congress in 1789.

Indeed, if anything is clear from the experiences under the 1967 Salary Act and the 1975 Adjustment Act, it is the wisdom of requiring Congress to set its own salaries in a discrete act of Congress. In the ten years since the passage of the Salary Act, the method of determining rates of compensation for most high ranking federal executives and judicial officers has been inextricably intertwined with the politically sensitive question of ascertaining Congressional pay. As a direct result, the worst of both worlds has been realized. On the one hand, Congressional salaries have increased 56% in ten years without passage of a single act of Congress which the American voters can look to in

judging the performance of their Senators and Representatives. On the other hand, badly needed increases in federal executive and judicial salaries have been rejected outright or frustrated in the appropriations process solely because they were intertwined with increases in Congressional pay that Congress believed to be inappropriate or politically unwise.

C. Appellant's Claim Raises Important Questions of Public Policy

Even if one ignores the doubtful nature of the district court's reasoning, appellant's claim is clearly of such importance that the Court should decide it only on the basis of full briefing and oral argument.

From an economic standpoint, very substantial sums of public finances are at stake. The increases in Congressional salaries recommended in the most recent quadrennial Commission report by themselves will require additional expenditures in excess of $7 million annually.

From the standpoint of governmental planning, it is clear that Congress and the President-elect intend to make substantial legislative additions to the legal structure under attack in this case. It is extremely important that this Court carefully consider and fully resolve all existing constitutional doubt about the existing legal structure before substantial additions are built upon it.

From a social policy standpoint, the case is doubly important. First, it is clear that the inadequacy of salaries for high ranking federal executives and judicial officers is a serious and growing problem. Appellant submits that no scheme of salary adjustment will ever solve this problem until the discrete and politically

sensitive question of ascertaining Congressional salaries is returned to its traditional and constitutionally mandated arena. Second, it is also clear that there is a popular belief that Congress is not sufficiently accountable to the public. Appellant's claim, if sustained, would restore the public accountability with respect to Congressional salaries that Article I, Section 6 intended.

D. Appellant's Claim Will Not Subvert the Methods of Ascertaining Non-Congressional Salaries or Result in Any Undue Hardship to Members of Congress

Although the issue presented by appellant is one of major importance, it should be noted that appellant's claim is limited in three significant respects.

First, appellant is not attacking the entire salary revision structure created by the 1967 Salary Act and the 1975 Adjustment Act. Appellant's claim, like Article I, Section 6 itself, is limited solely to the question of Congressional salaries. Appellant is seeking to enjoin only those increases in salary disbursements that are paid to members of Congress under the acts. Appellant's arguments do not affect the propriety of the acts insofar as they create a procedure for ascertaining executive or judicial salaries. The method of determining non-Congressional salaries under the acts is severable from the methods for ascertaining Congressional pay, and the injunctive relief requested by appellant would not affect the operation of the statutes insofar as non-Congressional salaries are involved.

Second, the injunctive relief that appellant is seeking in this case is limited to prospective relief only. Although appellant has donated to charity substantially all of his share of the increases in disbursements ordered under the statutes since his election to Con-

gress, it is apparent that retroactive equitable relief would be inappropriate in this case. *Cf., Chevron Oil Company* v. *Hudson,* 404 U.S. 97, 106-107 (1971). As a consequence, appellant is requesting injunctive relief only with respect to future disbursements of increases in Congressional pay that have been authorized under the acts.

Third, as this Court probably is aware, several federal judges have brought suit in the United States Court of Claims to challenge the levels of judicial pay. *Atkins, et al.* v. *United States,* Docket No. 41-76 (Ct. Cl., filed March 25, 1976). These judges claim that their salaries have been reduced in violation of Article III, Section 1, because the real dollar value of their compensation has steadily declined since the date of their appointment. Since appellant's claim is directed solely at the rates of Congressional pay, this appeal will not affect the claims in *Atkins.*

CONCLUSION

For all of the reasons stated above, appellant submits that the question presented in this appeal is substantial and that the Court should note probable jurisdiction and decide the case only upon full briefing and oral argument.

Respectfully submitted,

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20505
(202) 225-2801

Appellant, Pro Se

Dated: January 20, 1977

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 76-782

LARRY PRESSLER, Member, United States House of Representatives, *Plaintiff*,

v.

WILLIAM E. SIMON, Secretary of the Treasury; FRANCIS R. VALEO, Secretary of the United States Senate; KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Defendants*.

Before TAMM, *Circuit Judge*; GESELL, *District Judge*; and FLANNERY, *District Judge*.

Memorandum Opinion and Order

(FILED OCTOBER 12, 1976)

PER CURIAM. This action seeks a judgment declaring that those sections of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* ("Salary Act") and the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31 ("Adjustment Act"), which provide procedures to set new rates of compensation for members of Congress are unconstitutional, and to enjoin increased disbursements to members of Congress under the Acts. Plaintiff, The Honorable Larry Pressler, is a member of the United States House of Representatives from the First Congressional District of South Dakota, first elected in November, 1974.

The issues come before this Court on cross-motions for summary judgment, and defendants' motions to dismiss.[1] Argument was heard by this three-judge district court pursuant to 28 U.S.C. § 2284.

The Salary Act established a Commission on Executive, Legislative and Judicial Salaries ("the Commission"). At four-year intervals the Commission must recommend to the President pay rates for Senators, Representatives, Federal Judges and certain officials in the Legislative, Judicial and Executive branches of Government. After receiving the Commission report, the President is required to submit in the next budget message his recommendations as to the exact pay rate for those positions covered by the Salary Act. The pay rates thus recommended by the President for the different positions, including members of Congress, become effective 30 days after the budget is submitted to Congress unless other rates have been enacted by law, or one House of Congress specifically disapproves all or part of the recommendations.

The Adjustment Act provides for automatic cost-of-living adjustments in the salaries of members of Congress and other Executive, Judicial and Legislative officials. It provides in § 204(A) that congressional salaries determined by the Salary Act procedures will be automatically increased by an amount equal to the present increase being made by the President in the rates of pay of federal employees covered by the General Schedule as provided in 5 U.S.C. § 5305.

These two interrelated statutes represent a major break with tradition. For the almost 180 years since the ratification of the Constitution, the precise compensation of members of Congress was always fixed from time to time by

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[1] The Honorable James M. Jeffords, Member At Large of the United States House of Representatives from Vermont, filed a brief *amicus* in support of plaintiff's position.

specific legislation without any legislative involvement by the President.

The first recommendations by the Commission under the Salary Act were made in December, 1968. The President's subsequent recommendations took effect in February, 1969, without any action by the Congress, and congressional salaries were increased from $30,000 to $42,500 per annum. Mr. Pressler was not yet a member of the House. In February, 1974, after Mr. Pressler took office, the President's salary recommendations following the second Commission report were submitted to Congress. The Senate, by resolution, rejected all pay increases. The next Commission is expected to report to the President by January, 1977.

In October, 1975, Executive Order 11883, 40 F.R. 47091, increased General Schedule salaries and accordingly congressional salaries covered by the Adjustment Act were automatically increased from $42,500 to $44,600 per annum. In September, 1976, Congress refused another automatic pay increase in congressional salaries under the Adjustment Act by refusing to appropriate necessary funds in the Legislative Appropriations Act for 1977.

Congressman Pressler claims that the Salary Act and the Adjustment Act, whose operation has just been reviewed, violate Article I, Section 1, of the Constitution, and, more importantly, Article I, Section 6, of the Constitution, which states in pertinent part:

> The Senators and Representatives shall receive a Compensation for their Services to be ascertained by Law,
> . . . .

He claims that the payment of congressional salaries by defendants pursuant to the statutes in question injure him as a member of the House of Representatives by depriving him of his constitutional duty to vote on each ascertainment of congressional salaries.

I. *Standing*

It is initially argued that Congressman Pressler has no case or controversy with the defendants and, thereby, lacks standing to assert his claims. He sues as a citizen, a taxpayer, and a Congressman. It is only in this latter capacity that he can be heard, if at all. *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd,* 401 U.S. 901 (1971).

A Congressman has standing to sue by reason of his office where Executive action has impaired the efficacy of his vote, *Kennedy* v. *Sampson,* 511 F.2d 430, 436 (D.C. Cir. 1974); *cf. Coleman* v. *Miller,* 307 U.S. 433 (1939), or certain other congressional duties. *Mitchell* v. *Laird,* 488 F.2d 611 (D.C. Cir. 1973). The resulting injury under such circumstances is said to create a personal stake in the outcome sufficient to assure that a suit by a Congressman affected would be in a proper adversary context. *Kennedy* v. *Sampson, supra; see Baker* v. *Carr,* 369 U.S. 186 (1962). Congressman Pressler alleges not that the efficacy of his legislative vote was impaired by the Executive, but rather that his vote was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution. While it is clear that legislators have no special right to invoke court consideration of the validity of a statute passed over an objecting vote, *Korioth* v. *Briscoe,* 523 F.2d 1271 (5th Cir. 1975), where, as here, a member of Congress alleges he is prevented from voting to perform a specific legislative duty expressly mandated by the Constitution, the suit may be cognizable by the courts so long as there is no attempt being made to interfere with the internal workings of the Congress itself.[2]

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[2] If there were such an interference this case might present a political question, as was argued by defendants. But where statutes enacted by Congress are questioned under a specific constitutional clause, the political question doctrine should not be applied by the courts merely because a decision might have political consequences.

Mr. Pressler's suit meets this requirement, but he must show that *he* has been, or will be, injured before standing is recognized. *Warth* v. *Seldin,* 422 U.S. 490 (1975). Plaintiff's theory of injury is somewhat unclear, but sufficient facts have been alleged at this stage to support his claim of injury in fact. Under the Salary Act and the Adjustment Act the status quo as to congressional salaries may be altered without affirmative action by both Houses of Congress. While salaries may be changed in the traditional fashion, the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious.

In 1969, congressional salaries were raised by the new process for the first time. But Mr. Pressler was not yet a member of Congress and cannot claim his vote was impaired. In 1974, a proposed salary increase was vetoed by a Senate Resolution. The status quo was unaltered and we can see no injury to Mr. Pressler, though he was then a Congressman. While the next Commission should report to the President shortly, any injury from this action is far too speculative to support standing.

However, in October, 1975, congressional salaries, including Mr. Pressler's, were raised under the Adjustment Act. This change was effected without action by the House and Senate. This circumvention of the traditional legislative process impaired the efficacy of Mr. Pressler's vote. He has, therefore, standing to challenge the Adjustment Act. But that Act increases, on a percentage basis, the compensation as determined by Salary Act procedures. For this reason, Congressman Pressler has standing to challenge both pieces of legislation. Accordingly, standing will be afforded under the unique circumstances of this particular case.

II. *Ascertainment Clause*

Turning to the merits, the Court is asked to interpret the meaning and effect of the ascertainment clause in Article I, Section 6, of the Constitution. This is a matter of first impression.

Plaintiff contends that the phrase "to be ascertained by Law" constitutes an explicit mandatory requirement that whenever the compensation of members of Congress is redetermined it must be fixed at that time by a law that specifically states the amount to be paid and that the proposal, like any law, should then be open for debate and vote by the members of each House. Plaintiff urges, in short, that Congress is required itself to fix its pay and that that responsibility in this regard cannot, in effect, be delegated or by-passed in the fashion provided by the Salary Act and the Adjustement Act which allows periodic pay increases to take effect without affirmative congressional action.

For the reason set forth below, it appears to the Court that plaintiff's grievance is directed to what is essentially a matter of form rather than substance, and that Congress has established its compensation "by law" within the requirements of Article I, Section 6, when that section is read, as it must be, against accepted principles governing interpretation of the Constitution as a whole.

At the outset it should be noted that when Congress passed the Acts governing its compensation it acted "by law," as plaintiff himself concedes. The suggestion is, though, that the ascertainment is by others, not by the Congress. However, not only does the Commission which recommends pay levels contain members representing each House of Congress, but even in this circumstance the delegation is not absolute. When the President submits recommendations either House, acting alone, can by negative vote prevent the recommendations from taking effect. And

Congress has not stopped here. In the Salary Act it has explicitly reserved the right to enact legislation fixing congressional compensation regardless of what recommendation it receives from the President. As already noted, it also retains this right under the Adjustment Act by the use of its appropriation powers. Congress, by law, recently rejected an Adjustment Act pay increase by asserting its continuing authority always to fix its own pay.

Thus, it only remains to consider whether or not the verb "ascertain" has such a narrow and limiting effect that, as a matter of constitutional law, it was intended to prevent the Congress from developing rational procedures of this type for fixing congressional compensation by means other than enacting a specific statute fixing each pay change. Unfortunately no light is thrown on this subject by *The Federalist Papers* or the constitutional debates. As plaintiff's own research shows, there was much discussion of whether the states or the Congress itself should establish the level of congressional compensation. Various formulas were suggested, including fixing the amount in the Constitution itself, having it fluctuate depending on the average market value of a bushel of wheat, or determined by a special jury panel. None of this discussion, however, throws any significant light on the meaning of the word "ascertain." The most these historical sources reflect is that the Founding Fathers felt that the Congress should have ultimate responsibility for determining by law what the compensation of its own members should be, as opposed to the suggestion that this final responsibility be delegated to others. It was the eventually accepted view that if Congress acted irresponsibly in setting salaries, members would be held responsible by the voters. Congress has retained this ultimate responsibility and indeed has asserted it on more than one occasion

Congress continues to be responsible to the public for the level of pay its members receive. There is no conceal-

ment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which plaintiff seeks.

Repeatedly during the discussions preceding its adoption, our founders sought to preserve in the Constitution a flexible approach to government that would facilitate accommodation to changing conditions and experience. The Constitution is not to be parsed in the narrow, rigid, pedantic manner of a statute. It must remain flexible and adaptable, placing reliance upon the checks-and-balances built into our tripartite format and the sound attitude of voters expected at the polls. The "necessary and proper" clause of Section 7 of the same Article is but one expression of this sound approach. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819).

The Salary Act and the Adjustment Act fix congressional compensation by law and these statutes are not prohibited by Article I, Section 6. Neither of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution. Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed.

So Ordered.

/s/ illegible
United States Circuit Judge
/s/ illegible
United States District Judge
/s/ illegible
United States District Judge

October 12, 1976

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

Notice of Appeal to The Supreme Court of the United States

I. Notice is hereby given that the plaintiff above named hereby appeals to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Columbia, sitting as a three-judge district court pursuant to 28 U.S.C. § 2284, denying plaintiff's motion for summary judgment and dismissing the complaint entered in this action on October 12, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all necessary items to effect the appeal.

III. The following questions are presented by this appeal:

1. Whether those sections of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* violate Article I, Sections 1 and 6 of the United States Constitution, both on their face and as applied.

2. Whether the section of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, violates Article I, Sections 1 and 6 of the United States Constitution, both on its face and as applied.

/s/ LARRY PRESSLER, M. C.
Larry Pressler, M. C.
Pro se
1238 Longworth House Office Bldg.
Washington, D.C. 20515
Telephone: 202-225-2801

(*Proof of Service* Omitted in Printing)

APPENDIX C

2 U.S.C. §§ 351-361

§ 351. Establishment of Commission.

There is hereby established a Commission to be known as the Commission on Executive, Legislative, and Judicial Salaries (hereinafter referred to as the "Commission").

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§ 352. Membership of Commission; appointment; Chairman; term of office; vacancies; compensation; expenses; allowances.

(1) The Commission shall be composed of nine members who shall be appointed from private life, as follows:

(A) three appointed by the President of the United States, one of whom shall be designated as Chairman by the President;

(B) two appointed by the President of the Senate;

(C) two appointed by the Speaker of the House of Representatives; and

(D) two appointed by the Chief Justice of the United States.

(2) The terms of office of persons first appointed as members of the Commission shall be for the period of the 1969 fiscal year of the Federal Government, except that, if any appointment to membership on the Commission is made after the beginning and before the close of such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(3) After the close of the 1969 fiscal year of the Federal Government, persons shall be appointed as members of the Commission with respect to every fourth fiscal year following the 1969 fiscal year. The terms of office of persons so appointed shall be for the period of the fiscal year with respect to which the appointment is made, except that,

if any appointment is made after the beginning and before the close of any such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(4) A vacancy in the membership of the Commission shall be filled in the manner in which the original appointment was made.

(5) Each member of the Commission shall be paid at the rate of $100 for each day such member is engaged upon the work of the Commission and shall be allowed travel expenses, including a per diem allowance, in accordance with section 5703(b) of Title 5, when engaged in the performance of services for the Commission.

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§ 353. Executive Director; additional personnel; detail of personnel of other agencies.

(1) Without regard to the provisions of Title 5 governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, and on a temporary basis for periods covering all or part of any fiscal year referred to in section 352 (2) and (3) of this title—

(A) the Commission is authorized to appoint an Executive Director and fix his basic pay at the rate provided for level V of the Executive Schedule by section 5316 of Title 5; and

(B) with the approval of the Commission, the Executive Director is authorized to appoint and fix the basic pay (at respective rates not in excess of the maximum rate of the General Schedule in section 5332 of Title 5) of such additional personnel as may be necessary to carry out the function of the Commission.

(2) Upon the request of the Commission, the head of any department, agency, or establishment of any branch of the Federal Government is authorized to detail, on a reimbursable basis, for periods covering all or part of any fiscal year referred to in section 352 (2) and (3) of this title, any of the personnel of such department, agency, or establishment to assist the Commission in carrying out its function.

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§ 354. Use of United States mails by Commission.

The Commission may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

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§ 355. Administrative support services.

The Administrator of General Services shall provide administrative support services for the Commission on a reimbursable basis.

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§ 356. Functions of Commission.

The Commission shall conduct, in each of the respective fiscal years referred to in section 352 (2) and (3) of this title, a review of the rates of pay of—

(A) Senators, Members of the House of Representatives, and the Resident Commissioner from Puerto Rico;

(B) offices and positions in the legislative branch referred to in sections 136a and 136a-1 of this title, sections 42a and 51a of Title 31, sections 162a and 162b of Title 40, and section 39a of Title 44;

(C) justices, judges, and other personnel in the judicial branch referred to in sections 402(d) and 403 of the Federal Judicial Salary Act of 1964;

(D) offices and positions under the Executive Schedule in subchapter II of chapter 53 of Title 5; and

(E) the Governors of the Board of Governors of the United States Postal Service appointed under section 202 of Title 39.

Such review by the Commission shall be made for the purpose of determining and providing—

(i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and

(ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to the provisions of chapter 51 and subchapter III of chapter 53 of the Title 5, relating to classification and General Schedule pay rates.

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§ 357. Report to the President.

The Commission shall submit to the President a report of the results of each review conducted by the Commission of the offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title, together with its recommendations. Each such report shall be submitted on such date as the President may designate but not later than January 1 next following the close of the fiscal year in which the review is conducted by the Commission.

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§ 358. Recommendations of the President to Congress.

The President shall include, in the budget next transmitted by him to the Congress after the date of the submission of the report and recommendations of the Commission under section 357 of this title, his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title. As used in this section, the term "budget" means the budget referred to in section 11 of Title 31.

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§ 359. Same; effective date.

(1) Except as provided in paragraph (2) of this section, all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect.

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§ 360. Same; effect on existing law and prior recommendations.

The recommendations of the President transmitted to the Congress immediately following a review conducted by the

Commission in one of the fiscal years referred to in section 352 (2) and (3) of this title shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent incosistent therewith—

(A) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of such recommendations (other than any provision of law enacted in the period specified in paragraph (1) of section 359 of this title with respect to such recommendations), and

(B) any prior recommendations of the President which take effect under this chapter.

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§ 361. Publication of recommendations.

The recommendations of the President which take effect shall be printed in the Statutes at Large in the same volume as public laws and shall be printed in the Federal Register and included in the Code of Federal Regulations.

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